No. 18-443

# In the Supreme Court of the United States

BOBBY JAMES MOORE, PETITIONER

*v.*

TEXAS

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS*

## MOTION OF THE ATTORNEY GENERAL OF TEXAS FOR LEAVE TO INTERVENE AS A RESPONDENT


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## MOTION OF THE ATTORNEY GENERAL OF TEXAS FOR LEAVE TO INTERVENE AS A RESPONDENT

This case presents an unusual situation: the petitioner and respondent both maintain that the court below erred, and both contend that this Court should summarily reverse. But the decision below is correct, and this Court's review is unwarranted. The Attorney General of Texas therefore respectfully moves for leave to intervene as a respondent in order to file a brief in opposition.

Following this Court's decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017), the Texas Court of Criminal Appeals ("CCA") adopted the framework set forth in the latest edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) ("DSM-5") as the new Texas standard for assessing claims of intellectual disability under *Atkins v.*

*Virginia*, 536 U.S. 304 (2002). Pet. App. 2a. Applying that standard for the first time, Pet. App. 1a-39a, the CCA relied on the clinical judgment of the State's expert, a forensic psychologist, whose "methodology [wa]s consistent with the Supreme Court's dictates for evaluating intellectual disability," Pet. App. 17a, and whose testimony was "far more credible and reliable on the issue of adaptive functioning than the experts presented by the defense," Pet. App. 16a (internal quotation marks and footnote omitted). The State's expert concluded that petitioner did not have sufficient adaptive deficits "[e]ven before prison" to support an intellectual-disability diagnosis. Pet. App. 18a. Consistent with that clinical assessment, the CCA rejected petitioner's claim. Pet. App. 38a-39a.

Petitioner now requests the "strong medicine of summary reversal," *Pavan v. Smith*, 137 S. Ct. 2075, 2080 (2017) (per curiam) (Gorsuch, J., dissenting); *see* Pet. 2, because, he alleges, the CCA "failed to heed" this Court's "clear constitutional holdings in its previous decision," Pet. 26. That charge is baseless, and petitioner's effort to support it distorts and misconstrues the CCA's opinion.

Worse, petitioner asks this Court to summarily reverse without the benefit of an adversarial presentation. The nominal respondent in this Court—the Harris County District Attorney ("DA"), who resumed representation of the State on remand—has filed what amounts to a brief in support of the petition. Although she recognizes that the CCA correctly adopted the DSM-5's standard, Br. Opp. 6-7, she argues that the court erred in its application, and she joins petitioner's request

for summary reversal, *id.* at 9. The DA's decision to support petitioner leaves this Court with an unopposed petition for certiorari in a capital case—the one circumstance where a brief in opposition is mandatory.

Given these unusual circumstances, the Attorney General of Texas, by and through the undersigned counsel, respectfully moves for leave to intervene to file a true brief in opposition to the petition. The Attorney General is uniquely suited to intervene, given that he represented Texas in this very case (at the invitation of the DA's predecessor) when it was previously before this Court. And the Attorney General has a vital interest in defending the decision below—both as the State's chief legal officer and as the elected official charged with defending Texas prison officials in federal habeas proceedings.

In the alternative, if this Court does not permit intervention but grants plenary review, the Attorney General respectfully requests that he be appointed as amicus curiae to brief and argue, by and through the undersigned counsel, in support of the CCA's judgment. That sort of appointment is customary when a respondent government has "switched sides," as the DA did here. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2050-51 (2018). The Attorney General is well positioned to fulfill that role given his prior involvement in this case.

## REASONS FOR GRANTING THE MOTION

The Attorney General of Texas seeks to intervene in this Court as a respondent so that he may file a brief in opposition to the petition for a writ of certiorari. Intervention is warranted both because the Attorney General's interests are directly implicated by review of the

CCA's judgment and because the DA has declined to defend that judgment, leaving the Court to consider petitioner's request for summary reversal in a capital case without a true brief in opposition.

1. The Attorney General has a substantial interest in defending the CCA's judgment. Because the Texas Legislature has not enacted a framework for intellectual-disability claims under *Atkins*, the CCA stepped into the Legislature's role when it adopted the DSM-5 as a statewide standard. Defending the judgment adopting that standard and applying it for the first time therefore falls within the scope of the Attorney General's duty to defend Texas law. *See, e.g.*, *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) (recognizing the Attorney General as "the State's chief legal officer"); *cf.* Tex. Gov't Code § 402.010 (requiring notice to the Attorney General of constitutional challenges to state statutes). Moreover, the Attorney General has a direct interest in the standard governing *Atkins* claims because federal habeas cases are filed against the Director of the Texas Department of Criminal Justice, a state official whom the Attorney General is obligated to represent. *See, e.g.*, *Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2014) ("Texas law does not grant district attorneys the authority to represent either state officials . . . or the State in a federal habeas corpus proceeding.").

2. The DA, who represents just one of Texas's 254 counties, does not represent the Attorney General's interest. On remand from this Court, the DA resumed representation of the State pursuant to Texas law. *See, e.g.*, *Saldano v. State*, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002) ("The Constitution gives the county attorneys and

district attorneys authority to represent the State in criminal cases.").[1] Abruptly reversing the State's position, consistently advanced for the preceding 14 years, the DA agreed that petitioner is intellectually disabled and entitled to habeas relief. Respondent's Brief at 27-28, *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018) (No. WR-13,374-05). The DA offered no analysis to support that sudden change of course; she merely expressed her agreement in two conclusory sentences in the prayer of her brief. *Id.* Applying the DSM-5's framework, the CCA rejected the DA's position. Pet. App. 3a n.6.

Although the DA acknowledges that the CCA adopted the correct standard, she refuses to defend its judgment. As she did below, the DA has conceded the

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[1] The State of Texas is generally represented in criminal cases by district attorneys and the state prosecuting attorney. *See* Tex. Code Crim. Proc. Art. 2.01 ("Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely."); *Saldano*, 70 S.W.3d at 877 (explaining that the "state prosecuting attorney . . . has primary authority to represent the State in [the CCA] and authority to represent the State in the intermediate courts of appeal" (citing Tex. Gov't Code § 42.001(a))).

The Attorney General "has represented the State . . . in the great majority of its criminal cases in the Supreme Court," *id.* at 883, but under state law, the Attorney General's authority in criminal cases "is limited to assisting the district or county attorney, upon request," *id.* at 880 (citing Tex. Gov't Code § 402.028). As a result, the Attorney General has authority to represent the State in criminal matters before this Court but may not do so over the DA's objection.

merits of petitioner's claim. But her brief offers scarcely more analysis than her briefing below to support that position. Br. Opp. 7.

This Court has recognized the need for intervention in similar circumstances where a party's change of position leaves a nonparty's interest unprotected. The Court has permitted a nonparty to intervene and file a petition for a writ of certiorari, for instance, where the party refused to do so, *e.g.*, *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969); *Banks v. Chi. Grain Trimmers Ass'n*, 389 U.S. 813 (1967), and where it became clear that the party would dismiss its petition for a writ of certiorari, *e.g.*, *Commonwealth Land Title Ins. Co. v. Corman Constr., Inc.*, 508 U.S. 958 (1993). The need for intervention is at least as great here, where petitioner has already made his case for review, and the DA's decision to abandon the State's previous position without explanation leaves the petition for certiorari unanswered.

3. Intervention also serves the Court's interest because this is a capital case, and the petitioner and respondent seek summary reversal. Both of those factors call for heightened scrutiny, and both warrant the Attorney General's intervention as a respondent here.

*First*, this Court has made the filing of a brief in opposition "mandatory" in capital cases. Sup. Ct. R. 15.1. That requirement doubtless reflects that "the Court feels obligated to give death penalty cases an extraordinarily thorough examination at this juncture." *See* Stephen M. Shapiro, et al., Supreme Court Practice 584 (10th ed. 2013). But the DA has undermined that goal by failing to file a true brief in opposition. Indeed, because

the DA supports the petition, she has not satisfied a respondent's ordinary duty to "address any perceived misstatement of fact or law in the petition" and to raise "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below." Sup. Ct. R. 15.2. As an intervening respondent, the Attorney General can provide the adversarial testing contemplated by this Court's rules.

*Second*, the DA joins the petitioner in seeking "the extraordinary remedy of a summary reversal." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 512-13 (2001) (per curiam) (Stevens, J., dissenting); *see* Pet. 2, 26. Summary reversal of a capital case, while not "unprecedented," is an even more unusual step, *see Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016) (per curiam), typically taken only with the benefit of genuinely responsive briefing at the petition stage, *id.* (justifying summary reversal in part because "the State devoted the bulk of its 30-page brief in opposition to a point-by-point rebuttal of [the petitioner's] claims"), or following federal habeas proceedings in which lower courts had already reviewed the record and assessed the reasonableness of the state court's decision, *e.g.*, *Porter v. McCollum*, 558 U.S. 30, 38 (2009) (per curiam). Neither circumstance is present here.

4. The lack of a true brief in opposition imposes a particularly heavy burden in this case because the petition demands close scrutiny, but the nominal respondent provides none. The DA's brief in opposition makes no attempt to address petitioner's mischaracterization of the CCA's opinion or to identify the flaws in his arguments for reversal. Without an intervenor to test petitioner's

case, this Court must either deny the petition outright or discover those flaws for itself.

a. For example, although one would not know it from reading the petition, the CCA's conclusion that petitioner failed to meet the adaptive-functioning criterion for intellectual disability rested foremost on the clinical opinion of the forensic psychologist who testified as an expert for the State. Pet. App. 16a-19a. The CCA thus heeded the DSM-5's admonition that information about a person's adaptive functioning "must be interpreted using clinical judgment." Pet. App. 14a (quoting DSM-5 at 37). And the CCA had good reason to find the clinical judgment of the State's expert "far more credible and reliable" than the opinions offered by petitioner's experts. In addition to her "considerable experience in conducting forensic evaluations," the State's expert conducted a thorough, rigorous, and focused evaluation of petitioner's alleged adaptive deficits. Pet. App. 16a-17a. In contrast, only one of petitioner's three experts examined him personally for intellectual disability (and then only briefly), and his conclusion contradicted his earlier opinion—in this case—that petitioner *is not* intellectually disabled. Pet. App. 17a.

Petitioner attempts to tarnish the CCA's proper reliance on a clinical judgment, asserting that the State's expert "explicitly relied on the unconstitutional *Briseno* framework." Pet. 14; *see also* Pet. 20. That charge rests on a brief exchange in which the State's expert—asked whether she was aware of *Briseno* and whether an employer's comment that petitioner could influence others fit within a specific *Briseno* factor—responded only that

she was aware of *Briseno* and that the employer's comment was "one piece of information." JA 163-64.[2] That colloquy does not support petitioner's baseless claim that the State's expert "explicitly relied" on the "*Briseno* framework."

The record shows, to the contrary, that the State's expert based her opinion on current definitions of intellectual disability, not the 1992 definition that the CCA had adopted in *Briseno*. JA 135-36. She noted that current clinical practice emphasizes adaptive deficits. JA 136; Pet. App. 17a (finding her methodology "consistent with the Supreme Court's dictates for evaluating intellectual disability"). That emphasis is reflected in her conclusion that petitioner lacks the adaptive deficits to support an intellectual-disability diagnosis. JA 185; Pet. App. 18a.

b. After approving the clinical judgment of the State's expert, the CCA noted that substantial record evidence supported her opinion on petitioner's adaptive deficits and contradicted various findings of the trial court. Pet. App. 19a. The balance of the opinion surveys that evidence, organizing it into various skill areas described in the DSM-5. *Compare* Pet. App. 19a-38a (discussing evidence of petitioner's functioning in communication, language, math and money, learning, social, and practical skills), *with* DSM-5 at 37 (noting that "[a]daptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical"; the conceptual

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[2] "JA" refers to the joint appendix filed with this Court in the previous proceeding in this case. *See* Joint Appendix, *Moore v. Texas*, 137 S. Ct. 1039 (2017) (No. 15-797), 2016 WL 4094803.

domain includes competence in "language," "math reasoning," and "acquisition of practical knowledge"; the social domain includes "interpersonal communication skills"; and the practical domain includes "money management"). In short, the CCA addressed evidence made relevant by the DSM-5.

Petitioner aims most of his attack at this discussion. But his arguments misconstrue this Court's directives from its previous decision in this case and distort the CCA's analysis.

To illustrate, the Court previously held that the CCA's first decision had wrongly "overemphasized" petitioner's adaptive strengths and engaged in "the arbitrary offsetting of deficits against unconnected strengths." *Moore*, 137 S. Ct. at 1050 & n.8. Petitioner claims that, on remand, the CCA disregarded those holdings in concluding that, "in light of its view of [petitioner's] strengths, 'the level of [his] adaptive functioning was too great to support an intellectual-disability diagnosis.'" Pet. 12 (quoting Pet. App. 18a); *see also* Pet. 21-22. That selective quotation ignores that the CCA was describing the conclusion of *the State's expert*, who based that assessment on petitioner's lack of "adaptive deficits." Pet. App. 18a. Moreover, the DSM-5 instructs that the adaptive-functioning criterion is met when one domain "is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings." DSM-5 at 38. Considering what petitioner can do in a specific domain or skill area—which is all the CCA did—bears directly on whether he is "sufficiently impaired" to require support; it does not

impermissibly overemphasize strengths or arbitrarily offset unrelated deficits.

This Court also explained that the CCA had deviated from prevailing clinical standards when it "stressed" petitioner's improved functioning in prison. *Moore*, 137 S. Ct. at 1050. Petitioner argues that the CCA repeated that error on remand by "extensively" relying on his prison conduct. Pet. 12, 23-24. But there is no indication that the CCA gave undue weight to that evidence. Again, the CCA relied primarily on the clinical evaluation performed by the State's expert, who concluded that petitioner's adaptive functioning did not support an intellectual-disability diagnosis "even before he went to prison." Pet. App. 18a. In addition, because the trial court had relied on prison records to support its findings on intellectual disability, the CCA reasonably addressed that evidence in reviewing those findings. Pet. App. 26a-30a. Finally, assessing evidence of adaptive functioning in prison is not forbidden; it requires "corroborative information reflecting functioning outside those settings." DSM-5 at 38, *quoted in Moore*, 137 S. Ct. at 1050. The CCA followed the DSM-5 by considering that very information in its analysis. Pet. App. 18a-20a, 25a, 30a-36a.

This Court further admonished the CCA for treating circumstances and conditions that may coexist with intellectual disability as evidence that any adaptive deficits were unrelated to petitioner's intellectual functioning. *Moore*, 137 S. Ct. at 1051. On remand, the CCA adopted the DSM-5's distinct condition that "the deficits in adaptive functioning must be directly related to the intellectual impairments." DSM-5 at 38; Pet. App. 15a. But because the CCA concluded that petitioner did not have the

adaptive deficits to support an intellectual-disability diagnosis, Pet. App. 38a-39a, that obviated any need to inquire into the additional relatedness condition. Still, in a strained effort to construct some sort of defiance by the CCA, petitioner mines the opinion below for snippets that, in his view, evince the application of a "non-clinical conception of relatedness." Pet. 25. But those examples are nothing more than the CCA correcting unwarranted inferences drawn by the trial court. *E.g.*, Pet. App. 35a-36a (trial court's finding that petitioner "never held a real job" was erroneous but would not demonstrate intellectual disability even if correct).

Finally, this Court disapproved the CCA's prior use of the *Briseno* "evidentiary factors" in determining whether the relatedness requirement was met. *Moore*, 137 S. Ct. at 1051-52. Consistent with this Court's instruction, the CCA expressly "abandon[ed] reliance" on those factors on remand. Pet. App. 12a. But in another forced attempt to paint the CCA as a rogue court, petitioner urges that the decision below "resurrect[ed] the *Briseno* factors (in all but name)." Pet. 18. To support that claim, petitioner again mines the opinion below for references to evidence relevant to the clinical inquiry that he can tenuously connect to *Briseno*. For example, because the DSM-5 requires examination of competence in "language" and "communication skills," DSM-5 at 37, the CCA and the State's forensic-psychology expert both considered petitioner's testimony and argument in court proceedings. Pet. App. 20a-22a. But petitioner unreasonably condemns that inquiry merely because one *Briseno* factor had concerned how a person responds to questions. Pet. 18.

c. Petitioner's second question presented posits that the CCA compromised the reliability of his death sentence by denying habeas relief in the face of the DA's agreement that he is intellectually disabled. Pet. i, 27-28. But petitioner omits key facts that make the DA's agreement a poor indicator of the validity of his *Atkins* claim.

For one thing, the DA's concession was an abrupt reversal of her office's longstanding position that the *same* evidentiary record demonstrated that petitioner is *not* intellectually disabled. *See* Pet. App. 3a n.6. And the DA offered no analysis of petitioner's *Atkins* claim to support her concession—just two conclusory sentences in the prayer of her brief. Respondent's Brief at 27-28, *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018) (No. WR-13,374-05). If anything, it is the DA's concession that is tainted by unreliability, not the independent analysis and considered conclusion of the CCA.

* * * *

Petitioner's arguments outlined above should be fully addressed by a true brief in opposition before the Court considers the extraordinary remedy of summary reversal or even petitioner's alternative request for plenary review. If allowed to intervene, the Attorney General will perform that important function for the Court.

## CONCLUSION

The motion for leave to intervene should be granted. Alternatively, if the petition for a writ of certiorari is granted, the Attorney General of Texas respectfully requests that he be appointed to brief and argue, as amicus curiae, in support of the judgment below.

Respectfully submitted.

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